Supreme Court, U.S.
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No. 94-1699

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1994

DIANE ALADDIN, et al.,

*Petitioners,*

*v.*

GRUMMAN AMERICAN AVIATION CORPORATION, et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether a Judgment Order of the Court of Appeals for the Third Circuit, affirming the district court's discretionary exclusion of evidence of other accidents in a products liability diversity case, requires the issuance of a Writ of Certiorari where petitioners failed to establish a proper threshold foundation at trial that the other accidents were substantially similar to the accident at issue?

## DISCLOSURE OF CORPORATE PARTIES

Grumman American Aviation Corporation is a defunct corporate entity, having been merged into Gulfstream Aerospace Corporation. Gulfstream Aerospace Corporation is a Georgia corporation that is wholly owned by Gulfstream Delaware Corporation, a Delaware holding company, which in turn is wholly owned by Gulfstream Aerospace Corporation, a Delaware holding company.

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## STATEMENT OF THE CASE

Petitioners seek a writ of certiorari for review of a district court judgment, affirmed by the Third Circuit Court of Appeals, based upon alleged erroneous discretionary evidentiary rulings by the district court. The writ should be denied because the discretionary rulings in question simply do not merit review under Supreme Court Rule 10.1. There is no "split in the circuits" at issue, nor does the petition raise any important unresolved issue of law. On the contrary, the district court acted within its sound discretion in precluding evidence of or reference to other accidents because petitioners never made a threshold showing of substantial similarity at trial. This is merely a routine evidentiary issue that the district court resolved in accordance with well established law and petitioners have not come remotely close to establishing that there are special and important reasons for this Court to grant review.

## I. BACKGROUND

This case arises out of the crash of a two seat, single engine aircraft during a training flight on July 29, 1990. The aircraft, a model AA-1B, was designed and manufactured by respondent Grumman American Aircraft Corporation and owned by Hortman Aviation, Inc. Hortman Aviation operated a flight school and employed petitioners' decedent Carl Dunlap, the certified flight instructor who was providing flight instruction to petitioners' decedent Ziad Aladdin, a student pilot, when the crash occurred.

Petitioners instituted suit against Grumman alleging product defect and negligence theories. Grumman joined Hortman Aviation as a third-party defendant in connection with the *Aladdin* claim. At trial, petitioners sought to establish that the AA-1B was unsuitable for use as a primary trainer and that it crashed during normal flight training procedures due to allegedly defective aerodynamic stall characteristics. Grumman presented evidence that the aircraft was not defective and that the accident

resulted from reckless low flying of the aircraft. The jury returned a verdict for the defense, finding no defect or negligence.[1]

## II. EVIDENTIARY RULINGS AT ISSUE

The discretionary evidentiary rulings by the district court, which petitioners now ask this Court to review, were the subject of three motions in limine filed by respondents prior to trial. In these motions, respondents sought either to exclude certain evidence of other accidents entirely, or to preclude such evidence unless petitioners first made a threshold showing that the other accidents were "substantially similar" to the accident in question.[2] After full briefing and meeting with counsel, the district court granted all three motions. Having failed to make the necessary foundational showings at trial, petitioners now contend that these in limine rulings amounted

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1. The crash occurred in a wooded area adjacent to a small horse farm owned by the parents of Jennifer Carbarle. (J.A. at 1781- 1785). Ms. Carbarle, an eyewitness to the crash, testified that she was riding a horse in the pasture when the aircraft twice passed at low altitude, and on the second pass "buzzed" at the height of their garage — so low that she could have reached up and touched the plane with a broom stick. (J.A. at 1785-1786, 1808).

The statement of a second witness from the NTSB report had the aircraft flying at low altitude above the trees for some time before crashing. (J.A. at 1894-1897). Regulations of Federal Aviation Administration mandated that any flight in this type of location (*i.e.*, not an approved airport or landing site) must always be at least five hundred (500) feet above any person or building. (J.A. at 1833-1836); F.A.R. 91.119. Hortman Aviation also promulgated flight training rules to prohibit any flight training activity below one thousand (1000) feet. (J.A. at 1865).

2. Specifically, these motions were as follows:

1. Motion to preclude evidence of or reference to other accidents absent a foundational showing by plaintiffs of "substantial similarity" to the accident at issue (J.A. at 68-87);

2. Motion to preclude evidence of other accidents statistics absent a proper foundational showing by plaintiffs of the source and reliability of the data and requisite proof of "substantial similarity" to the present case (J.A. at 56-62); and

3. Motion to preclude evidence of certain FAA correspondence and FAA re-evaluation (J.A. at 96-105).

to "blanket prohibitions" that precluded them from making or having the opportunity to make a foundational showing, by trustworthy evidence, of substantial similarity to the accident at issue. Nothing is farther from the truth.

On the contrary, the record confirms that the district court repeatedly addressed these evidentiary issues and the threshold showing required for use of or reference to other accidents, either for direct examination through plaintiff's expert, Michael Antoniou, or cross-examination of defense witnesses. (J.A. at 981- 982, 1278, 1293, 1296-1297). Despite repeated opportunities, petitioners never made the required foundational showing, nor did they request an *in camera* hearing to establish substantial similarity of the other accidents, either through firsthand witnesses or accident investigative reports setting forth the specifics of the other accidents.

The district court also conducted a lengthy hearing outside the presence of the jury on the admissibility of a summary list contained in Grumman files that referenced other accidents, with petitioners' counsel conducting cross-examination of Gulfstream's Associate General Counsel. (J.A. at 1336-1349). It also read, *in camera,* a 111 page deposition transcript of former FAA Project Chief Charles Arnold regarding the admissibility of certain documents. (J.A. at 1012-1014).

Since petitioners never made the required foundational showing, despite numerous opportunities to do so, the district court properly excluded evidence of other accidents. As the district court noted in its Memorandum Opinion:

> Plaintiffs, however, did not request such a hearing. It is not the province of this Court to advise the parties as to how to present evidence. Furthermore, the court did in fact give plaintiffs the opportunity to argue the admissibility of other accidents and to present evidence on the question. . . . (J.A. at 267).

After the district court also denied petitioners' post-trial motions, petitioners appealed to the United States Court of

Appeals for the Third Circuit. After full briefing and oral argument on the issue petitioners now ask this court to review, the Third Circuit unanimously affirmed the judgment. Petitioners then moved for rehearing, which was denied since no judge on the panel requested rehearing and a majority of the circuit judges did not vote for rehearing *en banc. See,* Appendix, p. 1a; Fed. R. App. P. 35.

Petitioners now request that this court grant certiorari to review these same discretionary evidentiary rulings. For the most part, petitioners merely repeat the same arguments that were rejected by the district court and the Third Circuit. In so doing, petitioners have not raised an important issue of law, demonstrated a split of authority among the United States courts of appeals, or suggested any other special and important reason for this Court to grant review. Accordingly, the petition should be denied.

## SUMMARY OF THE ARGUMENT

This case involves routine evidentiary issues and does not implicate any reason to warrant discretionary review by this Court. There is no conflict among the courts of appeals as to the standard for admitting the evidence in question, nor does the judgment conflict with Pennsylvania law. Indeed the trial court applied the proper standard requiring a threshold determination of substantial similarity.

In applying this standard, the trial court found that petitioners did not avail themselves of the opportunity to prove that other accidents were substantially similar and constituted otherwise reliable evidence, and therefore properly excluded the evidence. The Third Circuit Court of Appeals thereafter properly reviewed petitioners' appeal and correctly ruled that it was without merit. The judgment in favor of respondents should be upheld without further review.

## ARGUMENT

### I. PETITIONERS HAVE FAILED TO SET FORTH GROUNDS SUFFICIENT TO JUSTIFY THIS COURT'S REVIEW OF DISCRETIONARY EVIDENTIARY RULINGS

Petitioners claim that review is warranted under Rule 10.1(a) on three grounds: (1) that the Third Circuit ruling conflicts with decisions of other circuits; (2) that the judgment conflicts with Pennsylvania Law; and (3) that the Third Circuit made an extreme departure from the accepted and usual course of judicial proceedings by supposedly "rubber-stamping" the judgment of the district court. None of these arguments has merit.

First, the record amply documents the district court's thoughtful review of evidentiary issues and proper exercise of its gatekeeper function in applying the rules of evidence, which required petitioners to make certain foundational showings prior to use of other accidents evidence or documents. Second, there is no genuine dispute as to the threshold inquiry: a showing of substantial similarity and compliance with other evidentiary proof such as factual foundation, relevance, and authentication for use of other accidents. *See, e.g., Gumbs v. International Harvester, Inc.*, 718 F.2d 88 (3d Cir. 1988). Petitioners simply failed to make the required threshold showing, and there is no need for this Court to review the discretionary evidentiary rulings, which have already been reviewed — and affirmed — by the Third Circuit. Far from raising an important question of law, this case merely presents a routine evidentiary issue that the district court resolved by exercising its discretion in accordance with well established law.

#### A. *Rule 10.1 Permits Review Only For Those Cases Demonstrating Special and Important Circumstances, Factors Not Present In This Case*

Supreme Court Rule 10.1 sets forth the considerations governing review by this Court on a writ of certiorari and pro-

vides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only where there are special and important reasons therefor." Subpart (a) provides criteria for determining whether to grant review based upon (1) conflict with rulings of other circuits on the same issue, (2) conflict with applicable state court of last resort or (3) extreme departure from accepted and usual course of judicial proceedings. Petitioners have not met any of these criteria.[3] On the contrary, this case merely involves the application of well-settled Pennsylvania products liability law and the Federal Rules of Evidence to the type of routine evidentiary rulings that are made by district court judges every day.[4] Accordingly, review by this Court is neither warranted nor justified.

### 1. *The Judgment In This Case Does Not Conflict With Rulings Of Other Circuits*

It is well-settled in the Third Circuit that evidence of other accidents cannot be admitted unless the party seeking to introduce such evidence makes a threshold showing of substantial similarity between the evidence sought to be admitted and the accident at issue in the underlying case. *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 92 (3d Cir. 1983)

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3. In earlier decisions this Court has cautioned:

> . . . that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a *real and embarrassing* conflict of opinion and authority between the Circuit Courts of Appeals.

*Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (emphasis supplied).

4. As members of this Court have stated previously, and in language equally applicable here:

> the only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

*Powell v. Nevada*, ___ U.S. ___, 114 S. Ct. 1280, 1284-85 (1994) (J. Thomas, dissenting) (*quoting Butz v. Glover Livestock Commission Company, Inc.*, 411 U.S. 182, 189 (1973) (J. Stewart, dissenting)).

(*accord Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988), holding that evidence of other accidents and accident statistics is not admissible, either directly or indirectly, unless the proponent of the evidence first satisfies the prerequisite foundational showing of "substantial similarity" to the accident at issue). *See also, Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992) and *Walker v. Messerschmitt Bolkow Blohm GmBH and MBB Helicopter Corp.*, 848 F.2d 496 (5th Cir. 1988). In the present case, all the district court did was apply these well settled legal principles to the facts of this particular dispute.

### 2. *Nor Does The Judgment Conflict With Pennsylvania Law*

Pennsylvania state court cases likewise require a showing of substantial similarity before admitting evidence of other accidents and this is true regardless of whether the evidence is being admitted to establish notice or the existence of a defect. *See, e.g., Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 334, 348 (1988); and *Whitman v. Riddell,* 324 Pa. Super. 177, 471 A.2d 521 (1984), where the courts required that the proponent of the evidence establish a foundation showing that it is substantially similar in addition to establishing that it (1) is logically related to the theory of a contested issue in the case, (2) is relevant, and (3) will not prejudice or confuse the jury.

Thus, it is clear that Pennsylvania law requires a threshold showing of substantial similarity. This is the showing which petitioners failed to make, despite numerous opportunities, and the exclusion of this "evidence" concerning other accidents was proper under both Pennsylvania state and federal court precedent. Accordingly, petitioners have not demonstrated that the judgment in this case conflicts with any decision of the Pennsylvania Supreme Court, the applicable state court of last resort. The district court merely exercised its broad discretion within the scope of these settled legal principles.

### B. *Petitioners' Claim That The Court Of Appeals Acted Improperly Is Wholly Without Merit*

Petitioners next maintain that this Court should review the Third Circuit's decision because that Court undertook "no appellate scrutiny whatsoever" and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (*See,* Petition, pp. 9, 13-14). *See also,* p. 14 (". . . appellate court simply disposing of another diversity case to clear its docket.").

These meritless accusations merely underscore the absence of any meritorious basis for Supreme Court review. The appellate issues were fully briefed to a panel of the Third Circuit, which granted and conducted oral argument. The Third Circuit panel affirmed the judgment of the district court. *See,* Appendix, p. 2a. Petition for rehearing was denied by Order of January 9, 1995. *See,* Appendix, p. 1a. Contrary to petitioners' unfounded contentions, the Third Circuit accorded this case proper and due consideration on appeal; and there is no justification for further review. Otherwise, as a practical matter, this court would need to grant review in virtually every case that was resolved by a judgment order in the court of appeals.

On the merits, moreover, the Third Circuit correctly determined that the district court did not abuse its discretion in making the evidentiary rulings in question. For the reasons briefly discussed below, those rulings were proper and fully consistent with Pennsylvania law, the law in other courts of appeals, and the Federal Rules of Evidence.

### C. *The Court Of Appeals Properly Affirmed The Discretionary Evidentiary Rulings Of The District Court*

Petitioners claim that the trial court acted improperly is equally without merit. The district court applied the correct substantial similarity standard and acted within its sound discretion as gatekeeper to require proper foundation before use of evidence of other accidents.

### 1. *The Requirement of "Substantial Similarity"*

Evidence of other accidents or accident statistics is not admissible, either directly or indirectly, unless the proponent first satisfies the prerequisite foundational showing of "substantial similarity" to the accident at issue. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988); *Whitman v. Riddell*, 324 Pa. Super. 177, 471 A.2d 521 (1984). Significantly, while petitioners try to create a conflict between the circuits or between federal and Pennsylvania state law in this regard, there is no conflict on the basic legal issue: that upon a threshold showing of substantial similarity to the accident at issue, evidence of other accidents or statistics *may* be admissible, provided that the other evidentiary considerations such as authenticity, relevance and hearsay exceptions are satisfied.

Moreover, the issue before the court of appeals was not whether the district court used the correct standard — substantial similarity — but whether the district court abused its discretion in finding that petitioners failed to satisfy that standard. In this regard, it is well settled that the admission or exclusion of evidence is a matter within the sound discretion of the trial court and that evidentiary rulings are reviewed under the abuse of discretion standard. *In re: Merritt Logan, Inc.*, 901 F.2d 349, 359 (3d Cir. 1990). *See also, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S. Ct. 2786, 2794 (1993) (re-emphasizes trial court's gatekeeper function).

Courts interpreting Pennsylvania law have repeatedly ruled that even with a foundational showing of substantial similarity, evidence of other accidents should be precluded unless such evidence (1) is logically related to the theory of a contested issue in the case, (2) is relevant, and (3) will not prejudice or confuse the jury. *See, Majdic v. Cincinnati Machine Co.*, 370 Pa. Super. 611, 537 A.2d 34, 348 (1988); *Whitman v. Riddell*, 324 Pa. Super. 177, 471 A.2d 521 (1984); *Uitts v. General Motors Corp.*, 411 F. Supp. 521 (E.D. Pa. 1974) *aff'd without opinion*, 513 F.2d 626 (3d Cir. 1975). The well established threshold for admissibility of other accidents evidence requires a showing of "similar accidents occurring ... under the same or similar circumstances." *Whitman v. Riddell*,

*supra,* 471 A.2d 523. *See also, Majdic v. Cincinnati Machine Co.,* 537 A.2d at 340-341.[5]

### 2. *Petitioners Repeatedly Failed To Meet The Substantial Similarity Requirement*

Despite numerous opportunities to do so, Petitioners never established of record that any of the "other accidents" in question were substantially similar to the accident in the present case. (J.A. at 266-268). Petitioners assert that they failed to establish substantial similarity because they were not permitted to do so. *See,* Petition, p. 13. Not so. As the district court recites in its Memorandum Opinion, the record reflects numerous instances where the court revisited the "other accidents" issue and made it very clear that it would not admit evidence of other accidents *unless petitioners first provided proof that those other accidents were substantially similar to the accident in the present case.* (J.A. at 752-753, 981-982, 1278, 1293, 1296-1297).

As the trial proceeded, this same issue arose on several occasions. Each time, plaintiffs' counsel argued the legal standards for admissibility and his personal conclusion that these other accidents were substantially similar. Each time, the district court noted that it did not, as of that time, have any evidence of substantial similarity:

> The Court: Well, you may have to call him back. I don't know what, *but I don't have anything, any evidence at this point that they are substantially similar* and we are not going to try fifteen other accident cases here that will unduly prolong the trial. So I will sustain the objection.

(J.A. at 982) (emphasis added). Throughout, the court conveyed to counsel the need for threshold proof of substantial similarity by competent evidence. (J.A. at 1278, 1293, 1296-97).

Despite these admonitions, petitioners never introduced evidence sufficient to establish substantial similarity and never

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5. Accordingly, Petitioners claim of an *Erie* issue is unfounded. *See,* Petition, p. 9.

made an appropriate offer of proof.[6] Thus, the court exercised its gatekeeper function. Petitioners never requested an *in camera* hearing on the substantial similarity issue and never made the requisite showing. Merely because petitioners' counsel may believe other accidents to be substantially similar to the accident at issue is not enough; nor does it relieve petitioners from satisfying the requirement of presenting appropriate *evidence* to establish substantial similarity.

### 3. *Substantial Similarity Is The Uniform Standard For Admissibility Of Other Accidents Evidence Under The Federal Rules Of Evidence, And The Ruling Below Does Not Conflict With Other Circuits*

Petitioners are simply wrong in asserting that there is material conflict between the circuits as to the substantial similarity threshold for admissibility of other accidents evidence. A review of pertinent case law from the Fifth, Seventh, Tenth, Twelfth and D.C. Circuits demonstrates the several flaws in petitioners' reasoning. All of these circuits, like the Third Circuit, require a showing of substantial similarity for admissibility of other accidents evidence, whether for direct evidence, notice or cross-examination. *See, Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434 (10th Cir. 1992) (substantial similarity standard applied and satisfied by actual testimony); *Walker v. Messerschmitt Bolkow Blohm GmBH and MBB Helicopter Corp.*, 848 F.2d 496 (5th Cir. 1988) (substantial similarity requirement applied and met based upon testimony from the pilot who was involved in the other accident). The fundamental distinction is that plaintiffs in *Four Corners*

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6. Likewise, petitioners never requested an *in camera* hearing to do so. While petitioners claim they were denied such, the record demonstrates that the district court permitted an *in camera* hearing when requested pertaining to documentary evidence, and permitted petitioners' counsel to call Thomas Ramee, Gulfstream's Deputy General Counsel, on cross-examination as part of that hearing. (J.A. at 1336-1349).

Likewise, the trial court reviewed *in camera* recorded testimony of Charles Arnold, an FAA official directly involved in FAA re-evaluation of Grumman aircraft, to determine admissibility of re-evaluation documents. (J.A. at 1012-1014).

and *Walker* established evidence of substantial similarity, whereas petitioners in this case did not.

Petitioners next assert that even were evidence of other accidents properly excluded in the first instance, it should have been admitted under a less stringent standard to prove notice of the alleged defect. This argument is also without merit. Proof of substantial similarity is still required, regardless of the purpose of the other accidents evidence. Again, there is no conflict among the courts of appeal on this point. *See, Jackson v. Firestone Tire and Rubber Co.,* 788 F.2d 1070 (5th Cir. 1986) (addressed the substantial similarity requirement for notice issues). *See also, Gumbs v. International Harvester, Inc.,* 718 F.2d 88, 97-98 (3d Cir. 1983) (evidence of prior accidents to prove notice of danger, existence of danger or cause of the accident requires showing of substantial similarity); *John McShain, Inc. v. Cessna Aircraft Corp.,* 563 F.2d 632 (3d Cir. 1977) (upheld district court refusal to admit thirty accident reports submitted by the NTSB as inadmissible hearsay); *Nachtsheim v. Beech Aircraft Corp.,* 847 F.2d 1261 (7th Cir. 1988) (upheld the trial court's exclusion of hearsay data offered through plaintiffs' expert in a case involving an airplane crash, since the other accident did not occur under conditions "substantially similar" to the accident at issue).

Having failed to meet the threshold to introduce evidence of other accidents during their case in chief or through their experts, petitioners next sought to introduce this same evidence through cross-examination of defense witnesses. Rulings with respect to the scope of cross-examination are within the sound discretion of the trial court. *United States v. Apfelbaum,* 621 F.2d 62, 65 (3d Cir. 1980); *United States v. Werme,* 939 F.2d 108 (3d Cir. 1991). The trial court's discretion in determining the scope and extent of cross-examination includes considerations of whether the matter is collateral, whether testimony is likely to confuse or mislead the jury and whether testimony would simply waste time. *See, Commonwealth v. Dunkle,* 385 Pa. Super. 317, 561 A.2d 5 (1989). Moreover, if contradictory evidence is not competent to be introduced as substantive evidence, it also cannot be used for purposes of impeachment. *Commonwealth v. Baez,* 494 Pa.

380, 431 A.2d 909 (1981); *McGoldrick v. Pennsylvania Railroad Co.*, 430 Pa. 597, 241 A.2d 90 (1968).

Finally, petitioners contend that the defense opened the door to permit testimony of other accidents evidence absent a showing of substantial similarity. Again, this is misplaced. The trial court should not be second guessed in its rulings on scope of cross-examination. (J.A. at 1012-1013). For all these reasons, and despite repeated attempts by petitioners' counsel, the district court did not abuse its discretion in excluding the evidence at issue in this petition.

## CONCLUSION

This petition does not raise an important question of law, nor any question of federal law on which the courts of appeals are in conflict. It merely presents a routine evidentiary ruling that the district court made in its discretion in accordance with well settled law. For all these reasons, respondents Grumman American Aviation Corporation and Gulfstream Aerospace Corporation respectfully urge this Court to deny this petition.

Respectfully submitted,

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